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Notes and Comments

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NOTES AND COMMENTS

THE PSYCHOLOGIST IN COURT

Outstanding among the problems facing the professional psychologist today is his status before the law and, in that connection, his position as an expert witness, whether in civil or criminal cases, is a matter of special importance. Use of the expert witness, of whatever character, has been a fairly modern innovation in the field of evidence law but even more recent is the practice of calling the psychologist to testify. In fact, the first use of a psychologist as an expert, in any type of case, appears to have been made in 1911 in Germany when Karle Marbe, in a civil action growing out of a train wreck, offered to explain the wreck by means of a reaction experiment. Since then, psychologists have served as expert witnesses in legal causes but the status of psychological testimony, as yet, remains unclear.

Before proceeding to a consideration of the cases dealing particularly with psychological testimony, it might be well to ascertain first what constitutes an expert witness. As federal and state courts generally follow much the same idea on the point, a definition provided by a federal court in the case of *Bratt v. Western Air Lines, Inc.*¹ could prove to be of interest. Judge Murrah, quoting from the American Law Institute's model code of Evidence,² there said that a witness "is an expert and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify, requires special knowledge, skill, experience, or training and that the witness has the requisite special knowledge, skill, experience or training."³ It should be noted, however, that whether any witness called to testify has such qualifications as to make his testimony admissible is a preliminary question for the judge presiding at the trial, and his decision on the point is conclusive unless the ruling can be shown to be clearly erroneous as a matter of law.

By way of explanation of the distinctive function performed by the expert witness, Professor McCormick has pointed out that the ordinary witness is called to testify "because he has first hand knowledge which the jury does not have of the situation or transaction at issue."⁴ In contrast, he notes that the expert witness has "something different to

¹ 155 F. (2d) 850 (1946).

² Restatement, Model Code of Evidence, § 402.

³ 155 F. (2d) 850 at 853.

⁴ McCormick, "Some Observations upon the Opinion Rule and Expert Testimony," 23 Tex. L. Rev. 109 (1945), at p. 121.

contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw." He then suggests that, to warrant the use of expert testimony, two elements are required. The first of these calls for a "subject of inference [which] must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of average laymen." As to the second, he indicates that "the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth."

The essential knowledge which, if possessed, marks the witness as an expert may, in some fields, "be derived from reading alone, in some from practice alone, or . . . from both." Professor McCormick also notes that while a court may decide that, for a particular subject of inquiry, the expert may have to be "a member of a given profession, as a doctor, an engineer or a chemist . . . a specialist in a particular branch within the profession will not be required." In the interest of growth in law, therefore, it is fortunate that, to date, the tests with respect to a given expert's qualifications have "not for the most part [become] crystallized in specific rules" but it is recognized that the matter is one "for the trial judge's discretion, reviewable only for abuse."⁵

Naturally, since the object of admitting the opinion of the expert into evidence is to inform the jury as to matters with which jurors would not be sufficiently familiar to draw their own inferences, it follows that "such a witness must possess a higher degree of knowledge in the field which is being investigated than the jurors themselves possess."⁶ If, then, it appears on examination that the witness is not so qualified, he should not be permitted to express an opinion, so the burden is on the party calling the supposed expert to establish the competency of his witness. If he fails in this respect but the witness is allowed to testify anyway, objection should be seasonably interposed in order that the error may be reviewed on appeal, for the error could well require a reversal of the judgment unless, at the same time, "it is evident that no prejudice has resulted" from the admission.⁷

It should not be understood that, for the purpose of expressing an expert opinion, the witness must hold some form of academic degree or be a graduate of an institution of higher learning but he should belong to the profession or calling to which the subject matter of the inquiry is related. What is more important is the fact that he should possess "special knowledge as to the very question on which he proposes

⁵ *Ibid.*, p. 122.

⁶ 19 Tex. Jur., Expert and Opinion Evidence, § 46, p. 69.

⁷ *Ibid.*, p. 71.

to express an opinion. This does not mean, however, that he must be more proficient on this subject than on any other within his field. A general knowledge of the department to which the speciality belongs would seem to be sufficient."⁸ In this respect, the witness may show that he possesses the requisite knowledge, even though he has not the practical knowledge of the subject, for he may have derived his information solely from a reading or study of technical works in the field.

In the event the witness is so qualified, his testimony may not be arbitrarily rejected *in toto*, as is illustrated by the case of *Boston Insurance Company v. Read*.⁹ In that case, the testimony of an insurance expert had been admitted into evidence but the trial judge, when instructing the jury, had stated that little consideration should be accorded to evidence of that character. The Circuit Court of Appeals for the Tenth Circuit, while affirming the decision, said the "testimony of expert witnesses cannot be arbitrarily rejected. Neither should it be indolently accepted but the weight to be given to testimony of that kind is for the court, or jury, as the case may be."¹⁰

Not only have courts, without the aid of statutory authorization, come to recognize the value of testimony from expert witnesses but, in some instances, the admission of such evidence has been specifically provided for by rule. Present Rule 28 of the Federal Rules of Criminal Procedure speaks directly to the point, giving to the court the power to appoint witnesses of its own selection if there be need for this,¹¹ and it has been said, with reference thereto, that a court should be free in the application thereof, construing the rule with the "greatest liberality" and arriving at constructions which are not based on "hair-splitting technicalities."¹² This tendency toward liberality with respect to the admission of expert testimony has also been evidenced by the declaration of another federal court to the effect that the "modern trend favors a wide rule of admis-

⁸ *Ibid.*, § 47, p. 72.

⁹ 166 F. (2d) 551 (1948).

¹⁰ 166 F. (2d) 551 at 553.

¹¹ Fed. Rules of Crim. Pro., Rule 28, states: "The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may . . . appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party . . . The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection."

¹² See *United States v. Cancellieri*, 5 F. R. D. 313 at 314 (1946).

sibility.”¹³ This view has not always been followed, however, for instances exist wherein qualified experts who had given testimony in one case have been excluded from testifying in other and similar cases, even though the latter cases arose from the same factual situation.¹⁴

It might be added that federal courts, at least with respect to matters concerning the admissibility of evidence, generally follow the law of the state or territory in which the court is sitting.¹⁵ They are, nevertheless, under an obligation, by virtue of Rule 43(a) of the Federal Rules of Civil Procedure, to apply either the local state or the federal rule, whichever favors admissibility,¹⁶ hence they possess more freedom on the point than is true of state courts. Such being the case, state court decisions excluding the use of expert testimony in any given area are not binding on federal courts.

Turning now to the use of psychologists as a source for expert testimony, it can be said that while a substantial amount of legal literature has been directed to the role of the psychiatrist as an expert witness¹⁷ little has been written on the part which the psychologist can perform in establishing proof as to matters falling within his specialty.¹⁸ It is true that the late Dean Wigmore once made specific reference to psychologists and their techniques when he wrote that, if psychometrical data was to be utilized, it would “have to be brought in by the expert witness” obtaining such data who, in that connection, “would stand on the same footing as the expert witness to insanity, called under the traditional practice,”¹⁹ but few others have mentioned the psychologist as one of a corps of experts whose services could be made available to aid the administration of justice.

There is, however, a small and growing number of judicial decisions which reflect the fact that psychologists have been used as witnesses, cases which serve to illustrate some of the problems likely to confront

¹³ See the opinion of Parker, C. J., in *United States v. 25.406 Acres of Land*, 172 F. (2d) 990 at 993 (1949).

¹⁴ In the case of *Williams v. Alabama Fuel & Iron Co.*, 212 Ala. 159, 102 So. 136 (1924), for example, a witness who had, in one case, given opinion testimony as to the cause of a mine explosion was excluded from testifying in another case which involved the same explosion.

¹⁵ *Lake Shore Nat. Bank v. Bellanca Aircraft Corp.*, 83 F. Supp. 795 (1949).

¹⁶ *Boerner v. United States*, 117 F. (2d) 387 (1941).

¹⁷ Books such as *Weihofen, Mental Disorder as a Criminal Defense* (Dennis & Co., Buffalo, 1954), *Gradwohl, Legal Medicine* (C. V. Mosby Co., St. Louis, 1954), and *Guttmacher and Weihofen, Psychiatry and the Law* (W. W. Norton & Co., Inc., New York, 1952), are but three of many illustrations.

¹⁸ Much of the material has been listed in *Louisell, "The Psychologist in Today's Legal World,"* 39 Minn. L. Rev. 235 (1955).

¹⁹ *Wigmore, Evidence*, 3d Ed., Vol. 3, § 997, p. 639.

them as well as the courts when they are called to testify with respect to matters within their special knowledge.²⁰ Many of these cases were heard by federal courts, but even then problems arose because of the differences in opinion held by varied state courts as to the expertness of the testimony submitted by the psychologists. It may be said, in general, that little doubt remains that psychologists are qualified to testifying in federal criminal cases for they have been utilized by the parties in some instances and appointed by the court in still others.²¹

For example, in the case of *Chandler v. United States*,²² after counsel for the defendant had made a motion to inquire into the sanity of his client, the court appointed three psychiatrists, the government appointed one psychiatrist, and a psychologist was appointed on behalf of the defendant. All these experts testified at considerable length. In the well-known case of *United States v. Hiss*,²³ a psychologist testified without his status as an expert being questioned. Although this witness had an M. D. degree, his chief work had been in a psychological clinic and he testified "I would call myself a psychologist."

In another case, that entitled *United States v. Cook*,²⁴ three sets of examining psychiatrists and psychologists were appointed to examine the defendant. One set of experts, a psychiatrist and a psychologist, concluded that the defendant was mentally ill but not legally insane. A second group of examiners, consisting of three psychiatrists, did not receive cooperation from the defendant and based their opinion that he was a psychopathic personality and not legally insane on only case history and observation. The third group of examiners, one psychiatrist and three psychologists from Menninger Clinic, were appointed by the presiding judge. This group diagnosed the defendant as schizophrenic. After hearing testimony, the judge gave his opinion that the defendant was a victim of environmental circumstances and that society had to pay its debt to him.

It should be noted that while the psychologist is a professional man he may not, as is the case with respect to certain other professions, decline to answer questions put to him on the ground his answers would require him to disclose confidential material learned from the patient for, as yet, there appears to be no psychologist-patient privilege. At least one federal

²⁰ The psychologist may, without question, give testimony based on observation of the character which would be accepted from any lay witness: *People v. Hawthorne*, 293 Mich. 15, 291 N. W. 205 (1940).

²¹ The text of Rule 28, Fed. Rules of Crim. Pro., is set out above at note 11, ante.

²² 171 F. (2d) 921 (1948), affirming 72 F. Supp. 230 (1947). Cert. den. 336 U. S. 918, 69 S. Ct. 640, 93 L. Ed. 1081 (1949).

²³ 185 F. (2d) 822 (1950).

²⁴ Not officially reported. The case is noted by Thorne and Smykal, *Journ. of Clinical Psychology* 1951, No. 7, pp. 299-316.

case exists wherein the presiding judge did insist that the psychological expert give complete answers to all questions and denied any claim of privileged communication although the expert sought to invoke the privilege,²⁵ which holding is the more remarkable because, in that state, the doctor-patient privilege had previously been upheld.

Not quite so uniform in character are the federal civil cases in which psychologists have been called to testify as experts. The degree of conflict is sharpened by the fact that, in two district court cases arising in the same state, one of the federal judges sustained an objection that a psychologist was not competent to testify as an expert witness²⁶ while, three years later, another federal judge sitting in the same district permitted the same psychologist to testify as an expert in a similar case.²⁷ In each case, the testimony related to the use of a battery of psychological tests in a situation where there was a question of brain damage so no inference can be drawn that the holdings are open to explanation on the basis of disparity as to the nature of the expert testimony or the qualifications of the expert witness.

Other instances concerning the use of psychological expert testimony in civil matters have been made a matter of record,²⁸ but the most recent illustration is furnished by the case of *Hidden v. Mutual Life Insurance Company of New York*.²⁹ The case was one in which an insured sought to recover benefits under a policy for total and permanent disability allegedly caused by a disabling nervous condition. Certain physicians and psychiatrists were permitted to testify on both sides of the case but the testimony of a fourth expert, offered as a witness by the insured, was excluded by the trial court on the ground the person in question was not qualified as an expert. This witness was not a physician but he held the degree of doctor of philosophy in clinical psychology, had had experience in army hospitals, had been engaged in private practice, and was also chief psychologist on the staff of a state institution for the treatment of mental diseases. On preliminary examination, he described the tests which he had administered³⁰ and stated that he was able to express an opinion as

²⁵ The case, not officially reported, is mentioned by Shoben, *American Psychologist* 1950, No. 5, pp. 496-8.

²⁶ Unreported case of *Stapleton v. Irwin & Bishop Grain Co.*, U. S. Dist. Ct. for So. Dist. of Texas (Dec., 1950).

²⁷ Unreported case of *Williams v. Hartford Accident & Indemnity Co.*, U. S. Dist. Ct. for So. Dist. of Texas (Dec., 1952).

²⁸ See Louisell, "The Psychologist in Today's Legal World," 39 *Minn. L. Rev.* 235 (1955), particularly p. 249, note 35, as to an expert in the field of advertising and marketing psychology, and p. 250, note 40, concerning the use of psychologists as expert witnesses in trade mark cases heard by the Federal Trade Commission.

²⁹ 217 F. (2d) 818 (1954).

³⁰ These tests included the finger-drawing test, the Rohrschach or ink blot test, and certain picture tests: 217 F. (2d) 818 at 820.

to the condition of the insured but, as mentioned, this testimony was excluded. After jury verdict for the defendant company, the Court of Appeals for the Fourth Circuit reversed for error in the ruling on the admissibility of this testimony, saying: "The uncontradicted evidence received at the trial tended to show that the expert was qualified in his field by academic training and by experience; and also that the objective tests which he described, although perhaps not well known to the general public, were recognized as helpful by medical experts in psychiatry . . . Accordingly it is our view that the evidence should have been received, and we are unable to say that its exclusion was harmless since the expert testimony played so large a part in the trial of the case."³¹

An even more considerable amount of conflicting evidence exists in the state court opinions on the matter of the expertness of testimony given by psychologists. Among the civil cases, mention could be made of the New Jersey holding in *Stemmer v. Kline*.³² The proceeding was one against a physician who had supposedly used X-ray treatment in the pelvic region of a pregnant woman. Her child was born prematurely, a microcephalic idiot. A psychologist who had examined the child about nine months before the trial of the case and who, before the examination, had been given a history of both the child and the parents,³³ expressed an expert opinion which was objected to on the ground the testimony and the opinion were based, to some extent, on hearsay evidence. Judgment for the plaintiff was reversed³⁴ but nothing was said reflecting on the right to use a psychologist's expert testimony, either as to the cause of the child's condition or as to matters of child development.

In contrast, in the South Carolina case of *Frederick v. Stewart*,³⁵ a case involving an issue with regard to the decedent's mental capacity to make a will, the point was made that a moron was not, *per se*, an insane person and that it would be absolutely necessary to subject such an individual to certain psychological tests at the hands of experts in mental diseases, such as psychiatrists or able psychologists, without which it would be impossible to determine the mental age of the individual. A charge to this effect was refused, and the refusal was upheld on appeal, when the

³¹ 217 F. (2d) 818 at 821.

³² 128 N. J. L. 455, 26 A. (2d) 489 and 684 (1942). Brogan, C. J., wrote a dissenting opinion which was concurred in by Perskie, Rafferty and Hague, JJ., but the dissent did not raise any issue as to the competency of the expert witness.

³³ The witness stated that both the examination and the history were essential to the formation of an opinion as to the cause of the infant's condition.

³⁴ The majority based this holding on the ground of an absence of liability for negligent harm to an unborn child. For more recent cases on this point, see notes in 28 CHICAGO-KENT LAW REVIEW 147 and 25 CHICAGO-KENT LAW REVIEW 162. The dissenting judges disagreed on this point, but voted to concur in the reversal because they believed a violation of the hearsay rule had occurred.

³⁵ 172 S. C. 188, 173 S. E. 623 (1934).

court indicated that, resolutions of the American Psychological Association to the contrary,³⁶ a physician could be allowed to testify as to moronic characteristics from physical examination alone.

Again, it is possible to note conflicting opinions within the same state regarding the admissibility of expert testimony by psychologists in civil matters. In one Texas case, such expert testimony was received without objection³⁷ and, in another, despite objection as to the validity thereof³⁸ but trial judges have, at times, sustained objection to the use of testimony of this character³⁹ and the psychologist has been denied the right to serve as a witness. Confusion of this nature, probably noted elsewhere, is no doubt likely to arise where the issue concerning the psychologist as an expert has never been passed upon by a reviewing tribunal. It should, as in Texas, become quickly resolved as soon as there is a higher court determination on the point.⁴⁰

In the realm of criminal law, the case selection is wider for it is in that area that the services of the psychologist as well as the psychiatrist will more likely be sought since a person's mental condition could be a matter of supreme importance. The earliest attempts to use the psychologist as an expert witness in cases of this nature failed. Nevertheless, it should be noted that the failure was not because of any serious objection to the competency of the expert as an expert but rather because, from the nature of the inquiry, the proffered testimony was open to objection for other reasons.⁴¹ The nature of the divided holding in the Michigan case of *People v. Hawthorne*⁴² reflected the likelihood of change for, while three of the judges were of the opinion that insanity, being a disease, was a

³⁶ That association, in 1915, had adopted a resolution to discourage the use of mental tests for practical psychological diagnosis by individuals unqualified for the work. By another resolution adopted in 1929, it was indicated that the diagnosis of the degree of mental deficiency in the classification of children should be in the hands of highly qualified psychologists.

³⁷ See the unreported case of *McGraw v. Chicago, Rock Island & Pacific R. R. Co.*, 125th Texas Dist. Ct. (June, 1952), and 11th Texas Dist. Ct. (March, 1953).

³⁸ Unreported case of *Cockrell v. Cockrell*, No. 433858, Court of Domestic Relations, Harris County, Texas (June, 1954).

³⁹ The decision in *Marini v. Marini*, 127th Texas Dist. Ct. (Nov., 1952), was not reported.

⁴⁰ The recent Texas case of *Watson v. State*, — Tex. Cr. R. —, 273 S. W. (2d) 879 (1954), is discussed hereafter. See note 46, post.

⁴¹ In *State v. Driver*, 88 W. Va. 479, 107 S. E. 189 (1921), testimony by a psychologist to the effect that the complaining witness was a moral pervert and not trustworthy was excluded because of the rule limiting impeachment to reputation evidence only. See also *People v. Villegas*, 29 Cal. App. (2d) 658, 85 P. (2d) 480 (1938), wherein a psychologist was denied the right to testify that the particular defendant was weak-willed and without sufficient stamina to resist coercion by a co-defendant but was permitted to give evidence as to general reputation.

⁴² 293 Mich. 15, 291 N. W. 205 (1940). Butzel, J., wrote a concurring opinion in which Bushnell, C. J., and Sharpe, North and Wiest, JJ., joined.

matter as to which only physicians would be competent to express an opinion, the five other judges, although concurring in a finding that no prejudicial error had occurred in excluding the expert testimony of an eminent psychologist,⁴³ expressed the belief that others beside physicians could provide expert evidence on the point.⁴⁴ Further qualification of the original denial was made in the case of *People v. McNichol*⁴⁵ for, in that case, a clinical psychologist was permitted to answer hypothetical questions although he was denied the right to answer specifically as to the result of certain examinations which he had made of the defendant or state the content of notes made during the course of the examination.

It was not until recently, however, that the position of the psychologist as an expert witness became firmly established as the result of decisions attained in Texas and New York. In the first of these cases, that of *Watson v. State*,⁴⁶ a person charged with murder had requested that a practicing psychologist⁴⁷ whom she intended to use as an expert witness should be excused from the operation of a rule to exclude all witnesses from the courtroom during the trial except while testifying but which request was denied. The accused took the stand, gave extensive testimony concerning her strange life and emotional reactions prior to and at the time of the homicide, and then called the psychologist to answer hypothetical questions based on a condensation of this testimony which he had not been permitted to hear.⁴⁸ Following conviction, the defendant appealed and urged that error had been committed by the exclusion of her witness from the courtroom. The higher court, in the first instance,⁴⁹ agreed with this

⁴³ The prejudicial character of the error was said to have been removed by reason of the fact that the psychologist, who knew the defendant personally, had been permitted to testify, as a lay witness would, on the basis of his personal observations of the defendant.

⁴⁴ The opinion of Butzel, J., 293 Mich. 15 at 22, 291 N. W. 205 at 208, stated that he did not "think we further the cause of justice by insisting that only a medical man may completely advise on the subject of mental condition." He added that he did not think it could be said that the psychologist's "ability to detect insanity is inferior to that of a medical man whose experience along such lines is not so intensive."

⁴⁵ 100 Cal. App. (2d) 554, 224 P. (2d) 21 (1950).

⁴⁶ — Tex. Cr. R. —, 273 S. W. (2d) 879 (1954).

⁴⁷ The witness had had five years of training at Harvard and two years at the University of Texas; had taught psychology for some years prior to going into penal institutional work; and had spent ten years in psychological counseling in various state and federal correctional institutions.

⁴⁸ There is some indication that the expert was, to some extent, discredited by the fact that he admitted that his opinion was based partly on what the defendant's counsel had told him about the case and not solely upon the facts included in the hypothetical question.

⁴⁹ The conviction was originally reversed but, following a petition by the state for rehearing, a majority of the court concluded that the trial judge was entitled to exercise a discretion on the point of whether or not to exclude the witnesses, which discretion had not been abused. Morrison, J., who wrote the original opinion, prepared and filed a dissenting opinion to the opinion on rehearing.

contention, saying that the witness should have been permitted to hear the defendant and the other witnesses give their testimony and then give his opinion as to the defendant's sanity on the basis of the whole of the testimony, as would be the case with respect to a medical expert.⁵⁰ In that connection, the court said that, while it was cognizant of the fact that the expert was not a psychiatrist, he did have "considerable training and experience in analyzing motivation for human conduct. A psychiatrist is certainly best qualified to pass upon a question of mental illness. However, we have consistently accepted the testimony of medical doctors as experts. We think that also of those qualified to give an opinion, superior to that of a layman, would be a practicing psychologist, and that Tedford [the excluded person] should be classified as an expert."⁵¹

The issue was not quite so sharply drawn in the even more recent New York case of *People v. Horton*⁵² but in that case, a murder prosecution in which the sanity of the defendant was directly in issue, psychologists as well as psychiatrists testified on both sides, the psychologists being permitted to give evidence based on psychometric examinations which they had made. The evidence as to the defendant's mental state was conflicting but neither the trial court nor the higher court appear to have had any doubt as to the competency of the psychologists to serve as expert witnesses nor was any objection raised by either side, so it might be said that courts are now evidencing a willingness to accept the aid of the psychological expert, within those areas where it is proper to utilize expert evidence, without questioning the propriety thereof.

Once an adequate definition of a competent psychological expert has been established by legal authorities,⁵³ the problems revealed in the foregoing cases will be much nearer to a solution. It would not seem to be improper to suggest that the several states ought now enact legislation pro-

⁵⁰ The court cited *Johnson v. State*, 10 Tex. App. 571 (1881), to the effect that, when medical experts are called, "the better and most satisfactory practice would be to allow them to remain in the room and hear the testimony." See also *People v. Lowhone*, 296 Ill. 391, 129 N. E. 781 (1921).

⁵¹ — Tex. Cr. R. —, 273 S. W. (2d) 879 at 882.

⁵² — N. Y. —, 123 N. E. (2d) 609 (1954). Van Voorhis, J., wrote a dissenting opinion but it was based on the premise that the defendant had been denied the right to have his theories with respect to the effect of his mental condition considered by the jury.

⁵³ An indication of the nature of the qualifications which a court may require of the psychologist who offers to serve as an expert witness may be found in the case of *In re Masters*, sub nom. *Teubner v. State*, 216 Minn. 553, 13 N. W. (2d) 487 (1944), a civil proceeding for restoration by a person previously adjudged to be feeble-minded. The court there said: "A psychologist who holds a Master's degree from a university where he majored in educational psychology and who for eight years had been employed by the state as a psychologist devoting most of his time to conducting tests to determine the intelligence quotient (IQ) of persons committed to state institutions as feeble minded, is qualified to testify as an expert. . . ." 216 Minn. 553 at 559, 13 N. W. (2d) 487 at 491.

viding for the certification or licensing of psychologists, specifying the minimal education and experience background to be required.⁵⁴ By so regulating the practice, it would be possible to create a class from which the trial judge would be able to pick an expert without being forced to prejudge the professional competence of the witness. So long as any person may call himself a psychologist, however, it is only natural to expect that there will be resistance to the proposal that the mantle of expert witness should be granted to psychologists as a class.

J. L. McCARY*

PROTECTING THE REMAINDERMAN

Whenever a remainder has been created to follow upon a particular estate, questions might well arise as to the measure of protection afforded by law to the interest of the remainderman. Is it, for example, within the jurisdiction of a probate court, if the interest stems from a will, to make provision for protection prior to permitting a distribution of the assets? Would an executor have either the right or the duty to protect such interests? If not, are there proceedings which the remainderman himself may institute and, if so, upon what terms? To these questions, other queries might be added dependent upon the nature of the property, the provisions of the will, the residence of the parties, and the spendthrift propensities of the holder of the particular estate, to name but a few. If these should be blended together and topped with any requirements which may exist in the form of applicable state statutes, the result could well be a recipe for food for thought.

The recent Ohio case of *In re Miller's Estate*¹ will serve nicely as an illustration for some of the problems. The testator there, by his will, left the residue of his estate in shares to his wife, his son, and his daughter for life. His widow renounced the will and, as a result, the share in which the daughter was entitled to a life interest amounted to about \$450,000. The will directed that, upon the death of the daughter, this share was to be divided among her children or their issue. It was further provided in the will that the daughter was to have full power and authority to manage, control, invest and reinvest, sell, convey and exchange the property held

⁵⁴ The Executive Secretary of the American Psychological Association has on hand copies of certification and licensing bills which have been introduced into state legislatures, together with proposals for the formation of state psychological organizations.

* Ph.D., University of Texas, 1948. Director, Clinical Training Program, Psychology Department, University of Houston.

¹ 160 Ohio St. 529, 117 N. E. (2d) 598 (1954), affirming 95 Ohio App. 457, 121 N. E. (2d) 26 (1953).

by her "notwithstanding any statute or rule of law or equity to the contrary." The will also directed that the property, which consisted of personalty, was to be delivered to the life tenant, was not to be held by the executors or by any trustee or trustees for the benefit of the life tenant, and that "the court shall not have authority to direct otherwise." The daughter, a resident of California, in the space of five years just prior to the present proceeding, had expended nearly \$500,000 inherited from another relative and was, for all practical purposes, insolvent at the time the proceeding in question was instituted. Ohio had a statute which read: "When by a last will and testament the use or income of personal property is given to a person for a term of years or for life, and some other person has an interest in such property as remainderman, the probate court, unless such last will and testament otherwise provides, may deliver such personal property to the person having the limited estate, with or without bond, as the court may determine; or the court may order that such property be held by the executor or some other trustee, with or without bond, for the benefit" of the person having the limited estate.²

The daughter filed an application for the distribution of the corpus of her share to her, whereupon the executors instituted a proceeding in the nature of an action for a declaratory judgment concerning matters affecting the distribution. The two proceedings were consolidated and the probate court entered an order directing the executors to pay the daughter's share to a trustee to be held and managed for the benefit of the daughter during her lifetime and to be distributed to the remaindermen upon her death. Upon appeal by the daughter, the Ohio Appellate Court affirmed. The daughter's motion to certify the record was allowed but the Supreme Court of Ohio also affirmed, holding that the statute created two distinct remedies in the alternative. Since the two alternatives were separated by a semi-colon, the phrase "unless the last will and testament otherwise provides," as used in the first clause, did not operate to modify or control the second clause. Giving consideration to the spendthrift propensities of the life tenant, the Supreme Court expressed satisfaction that the probate court had not acted arbitrarily in exercising its discretion at the time it ordered the appointment of a trustee.

The case mentioned formed a novel situation in the law of Ohio but it also provides a delightful appetizer to introduce the problem of providing protection for the remainderman in those instances where the instrument involved has not provided protection because of a failure to use the common device of designating a disinterested trustee to control the corpus in the interest of both the life tenant and the remainderman. At the

² Ohio Rev. Code 1953, § 2113.58.

outset, it should be pointed out that it is recognized that there are more particular estates than life estates, more future interests than just remainders, and that such future interests need not arise solely under wills but, because by far the greater number of cases have been concerned with the protection of a remainder interest created by will to follow upon a life estate, this discussion will proceed on that basis. For much the same reason, the analysis has been limited to cases dealing with personal property, leaving aside such remedies as waste, partition or the like which might be available where the estate consists of realty.

Inasmuch as the relationship between the life tenant and the remainderman may help determine where and by whom protection can be sought, the discussion begins with an analysis thereof. While some courts have said that the life tenant is a trustee for the remainderman³ and other courts have denied the existence of any such relationship,⁴ an apparent majority of the cases hold that the life tenant is a trustee in only a limited sense⁵ or that he is a quasi-trustee.⁶ It is difficult to picture a true trustee having the use of trust property for his own exclusive benefit with the right to all income and profits, so perhaps the courts using the term "trustee" did not intend it in its truest sense but were using the term loosely to mean that the life tenant had a duty to preserve the property with due regard for the rights of the remainderman and without doing anything to the detriment or injury of the latter's interest. Cases can also be found which indicate that a fiduciary relationship exists⁷ but a

³ See, for example, *Little v. Geer*, 69 Conn. 411, 37 A. 1056 (1897); *Diller v. Kilgore*, 135 Kan. 200, 9 P. (2d) 643 (1932); *Burlington County National Bank v. Braddock*, 24 N. J. Super. 462, 94 A. (2d) 863 (1953); *Anderson v. Anderson*, 133 N. J. Eq. 311, 32 A. (2d) 83 (1943); *Peck v. Smith*, 227 N. Y. 228, 125 N. E. 91 (1919), reversing 183 App. Div. 336, 170 N. Y. S. 500 (1918), on the ground the suit was being brought by the wrong party; *In re Hamlin*, 141 App. Div. 318, 126 N. Y. S. 396 (1910); *Evans v. Adams*, 180 S. C. 214, 185 S. E. 57 (1936); *Bentley v. Long*, 1 Strob. Eq. 43, 47 Am. Dec. 523 (S. C., 1846).

⁴ To that effect, see *Lazenby v. Ware*, 178 Ga. 463, 173 S. E. 86 (1934); *In re Walsh's Estate*, 239 Pa. 616, 86 A. 1091 (1913).

⁵ For illustrative cases, see *Warfield v. Bixby*, 51 F. (2d) 210 (1931), and *Buder v. Franz*, 27 F. (2d) 101 (1928). In *Cooke v. United States*, 115 F. Supp. 830 (1953), the life tenant was held not to be a trustee in the sense that he would be liable for the payment of taxes on gains which would accrue to the remainderman. See also *Kepert v. Kepert*, 79 Ind. App. 633, 134 N. E. 297 (1922); *In re Larson's Estate*, 261 Wis. 206, 52 N. W. (2d) 141 (1952).

⁶ *Andrews v. New Britain National Bank*, 113 Conn. 467, 155 A. 838 (1931); *Williams v. Morrison*, 242 Iowa 1054, 48 N. W. (2d) 666 (1951); *Mallett v. Hall*, 129 Me. 148, 150 A. 531 (1930); *Attebery v. Prentice*, 158 Neb. 795, 65 N. W. (2d) 138 (1954); *Morrow v. Person*, 195 Tenn. 370, 259 S. W. (2d) 665 (1953); *Collins v. Hartford Accident & Indemnity Co.*, 178 Va. 501, 17 S. E. (2d) 413, 137 A. L. R. 1046 (1941).

⁷ Georgia seems to support this theory: *Bienvenu v. First Nat'l Bank of Atlanta*, 193 Ga. 101, 17 S. E. (2d) 257 (1941); *Crisp County Lumber Co. v. Bridges*, 187 Ga. 484, 200 S. E. 777, 126 A. L. R. 333 (1939). But see contra, *Mallett v. Hall*, 129 Me. 148, 150 A. 531 (1930).

reading of these cases again indicates that the term was used in its broadest sense. The Pennsylvania courts seemingly stand alone in holding that a debtor-creditor relationship is established,⁸ under which theory the life tenant becomes the owner of the property and the debtor of the remainderman for the appraised value of the property at the time of distribution less the value of any property which the life tenant has consumed, provided a power to consume has been granted.⁹

The logical and most practical time to afford protection for the remainderman's interest would appear to be prior to the distribution of the property to the life tenant so it is not surprising to find that the most common remedy is to seek security from the life tenant, on distribution, for the eventual safe surrender of the property to the remainderman.¹⁰ Investigation reveals that, in early practice, the remainderman was entitled, in all cases, to seek security from the life tenant¹¹ but, in modern practice, the general rule would appear to be one to the effect that security will be required only if an actual or threatened danger to the legacy in the hands of the life tenant can be shown.¹² Before accepting or rejecting any such general rule, it would seem that an inquiry into the facts and circumstances of the cases would be in order. Starting with the nature of the property itself, the case of *Whittemore v. Russell*¹³ suggests that,

⁸ See *In re Lyman's Estate*, 366 Pa. 164, 76 A. (2d) 633 (1950); *In re Hay's Estate*, 358 Pa. 38, 55 A. (2d) 763 (1947); *In re Powell's Estate*, 340 Pa. 404, 17 A. (2d) 391 (1941), which appears to be the first case recognizing a debtor-creditor relationship where the life tenant had been given a power to consume the principal. See also *In re Kirkpatrick's Estate*, 284 Pa. 583, 131 A. 361 (1925); *In re Letterle's Estate*, 248 Pa. 95, 93 A. 935 (1915); *Appeal of Reiff*, 124 Pa. 145, 16 A. 636 (1889); *In re Gillett's Estate*, 130 Pa. Super. 309, 197 A. 517 (1938).

⁹ *In re Powell's Estate*, 340 Pa. 404, 17 A. (2d) 391 (1941); *In re Gillett's Estate*, 130 Pa. Super. 309, 197 A. 517 (1938). An interesting corollary of this theory is that the life tenant, even one with a power to consume, is liable for any depreciation: *In re Lyman's Estate*, 366 Pa. 164, 76 A. (2d) 633 (1950).

¹⁰ General discussions with respect to this remedy appear in 138 A. L. R. 440, 101 A. L. R. 271, and 14 A. L. R. 1066. See also 33 Am. Jur., Life Estates, Remainders and Reversions, § 225; 31 C. J. S., Estates, §§ 59 and 134; and 23 R. C. L., Remainders, § 138.

¹¹ The history of this rule is given in Story, Commentaries on Equity Jurisprudence (Little, Brown & Co., Boston, 1877), Vol. 1, § 604. Cases following the old practice have required the giving of security even without a showing of danger: *Security Co. v. Hardenberg*, 53 Conn. 169, 2 A. 391 (1885); *In re Taylor's Estate*, 149 Misc. 705, 268 N. Y. S. 70 (1933), affirmed on memorandum in 242 App. Div. 608, 271 N. Y. S. 1057 (1934).

¹² Story, op. cit., § 604. This rule is illustrated by *Bethea v. Bethea*, 116 Ala. 265, 22 So. 561 (1897); *Dougherty v. Conley*, 14 Del. Ch. 176, 123 A. 401 (1924); *In re Will of Oertle*, 34 Minn. 173, 24 N. W. 924 (1885); *Bentley v. Long*, 1 Strob. Eq. 43, 47 Am. Dec. 523 (S. C., 1846); and *Wise v. Hinegardner*, 97 W. Va. 587, 125 S. E. 579 (1924). The case of *Washbon v. Cope*, 67 Hun. 272, 22 N. Y. S. 241 (1893), applying this rule, was later reversed in 144 N. Y. 287, 39 N. E. 388 (1895), on the ground the legatee took a fee rather than a life estate.

¹³ 80 Me. 297, 14 A. 197 (1888).

if the property is such as would depreciate but not necessarily wear out by use, security will not usually be required, but if the use of money, without the discretion to consume the principal, has been given, security will be required or a trustee appointed to preserve the fund. Even so, the court said, these general rules would bend to the force of circumstance and might vary, or even be dispensed with, according to whatever possibilities and probabilities the court might deem proper to consider.

Closely allied to the nature of the property is the character of the bequest, whether specific or general. In the case of a general or residuary bequest, it has been said that the whole must be sold and converted into money by the executor, following which the proceeds must be invested and the income paid to the life tenant, but that no conversion will be required if it can be found that the testator intended the life tenant to have possession of the property in specie.¹⁴ It is at this point that the question of the testator's intent can become the source of much confusion. The testator can expressly and completely declare his intentions, only to have the same overridden by a court as in the Ohio case mentioned above,¹⁵ or may leave the intention to be implied or presumed. The fact that a testator has directed that possession be given to the life tenant has been said to indicate an intention that no security should be required¹⁶ but, despite this fact, some courts have held that security may still be required, particularly where the property is a fund of money, or its equivalent, and the life tenant is only entitled to the use thereof or the income arising therefrom without the right to invade the principal.¹⁷ Where the gift is in the form of a specific legacy, the general rule would appear to be that possession should be given.¹⁸ This fact, in turn, would seem to indicate

¹⁴ The New Jersey cases of *Howard v. Howard*, 16 N. J. Eq. 486 (1864), and *In re Van Wagoner's Estate*, 97 A. 893 (N. J. Prerog. Ct., 1916), set out the rule. See also 17 R. C. L., *Life Estates*, § 17.

¹⁵ *In re Miller's Estate*, 160 Ohio St. 529, 117 N. E. (2d) 598 (1954), affirming 95 Ohio App. 457, 121 N. E. (2d) 26 (1953).

¹⁶ See, for example, *Cecil v. Cecil*, 161 Ky. 419, 170 S. W. 973 (1914), rehearing den. 171 S. W. xvi; *In re Ungrich*, 48 App. Div. 594, 62 N. Y. S. 975 (1900), affirmed in 166 N. Y. 618, 59 N. E. 1131 (1901); *Collins v. Hartford Accident & Indemnity Co.*, 178 Va. 501, 17 S. E. (2d) 413, 137 A. L. R. 1046 (1941).

¹⁷ Illustrations of this exception may be found in *Frye v. Community Chest*, 241 Ala. 591, 4 So. (2d) 140 (1941); *Barmore v. Gibert*, 151 Ga. 260, 106 S. E. 269, 14 A. L. R. 1060 (1921); *Tripp v. Krauth*, 340 Ill. 11, 171 N. E. 919 (1930); *Kelly v. Anderson*, 173 Ky. 282, 190 S. W. 1101 (1917); *Tapley v. Douglas*, 113 Me. 392, 94 A. 486 (1915). In the case of *In re Recke's Estate*, 112 Misc. 673, 184 N. Y. S. 278 (1920), the court held that the executors would be liable for paying over a fund of money to the life tenant without requiring security. In contrast thereto, see *Scott v. Scott*, 137 Iowa 239, 114 N. W. 881, 126 Am. Dec. 277, 23 L. R. A. (N. S.) 716 (1908), and *McKee v. McKee's Executor*, 26 Ky. L. R. 736, 82 S. W. 451 (1904), where it was held that it was discretionary with the executor to determine whether security was required.

¹⁸ For statements of the rule see 28 R. C. L., *Wills*, § 263; 57 Am. Jur., *Wills*, § 1401; 34 C. J. S., *Executors and Administrators*, § 493c.

that no security should be required but, without doubt, the strongest situation for not requiring security would be one wherein the testator has indicated that the life tenant should have both possession and a power to invade, consume, or dispose of all or part of the principal.¹⁹ The fact that the life tenant was also the executor and, in that capacity, was expressly excused from being obliged to give an executor's bond has been generally held to be of no consequence on the question of requiring security from the party in his capacity as life tenant.²⁰ It is apparent, then, that the nature of the property, the character of the bequest, and the intention of the testator are matters so inter-related that they must be considered concurrently in order to avoid going around in circles.

Where the life tenant is a non-resident of the jurisdiction in which the estate is being administered, some courts have felt that this fact could be considered as a sufficient hazard to the interest of the remainderman to justify the requirement of security.²¹ These cases lead back to the general rule, stated above, that security will be required, absent intention of the testator to the contrary, only upon a proper showing of danger to the remainderman's interest. In addition, courts have indicated that a danger could exist where there is a reasonable ground to apprehend removal of the property from the jurisdiction,²² where the life tenant has shown a disposition to waste or destroy the property,²³ or where the life tenant is insolvent.²⁴ The general rule is so well illustrated and supported by the cases cited that, with allowance for possible exceptions stemming from the nature of the property, the character of the bequest, and the intention of the testator, it seems to cover the field quite adequately.

Assuming that security for the protection of the remainderman would be proper, it remains to be determined how this security is to be acquired.

¹⁹ *LaTourette v. LaTourette*, 15 Ariz. 200, 137 P. 426 (1914); *In re Garrity's Estate*, 108 Cal. 463, 41 P. 485 (1895); *Old Colony Trust Co. v. Swift*, — Mass. —, 122 N. E. (2d) 757 (1954); *Woolfitt v. Preston*, 203 Mich. 502, 169 N. W. 838 (1918); *In re Niles' Will*, 122 Misc. 17, 202 N. Y. S. 475 (1923), affirmed on memorandum in 211 App. Div. 826, 206 N. Y. S. 940 (1924).

²⁰ *Reed v. Reed*, 80 Conn. 411, 68 A. 852 (1908); *Gahan v. Golden*, 330 Ill. 624, 162 N. E. 164 (1928); *Maguire v. Maguire*, 110 La. 279, 34 So. 443 (1903); *McGuire v. Gallagher*, 99 Me. 334, 59 A. 445 (1904).

²¹ See, for example, *Frye v. Community Chest*, 241 Ala. 591, 4 So. (2d) 140 (1941); *Cort v. Massie*, 171 Ill. App. 123 (1912); *In re Mercantile Trust Co.*, 156 App. Div. 224, 141 N. Y. S. 460 (1913), modified on other grounds in 210 N. Y. 83, 103 N. E. 884 (1913). *Contra*: *Fiske, Adm'r v. Cobb*, 72 Mass. 144 (1856).

²² *Ernul v. Ernul*, 191 N. C. 347, 132 S. E. 2 (1926); *Long v. Lea*, 177 S. C. 231, 181 S. E. 6, 101 A. L. R. 266 (1935).

²³ *Marshall v. Hewett*, 156 Fla. 645, 24 So. (2d) 1 (1945); *Buckman's Trustee v. Ohio Valley Trust Co.*, 288 Ky. 114, 155 S. W. (2d) 749, 138 A. L. R. 436 (1941); *Rife v. Rife*, 154 Miss. 529, 122 So. 739 (1929). *Contra*: *Hill v. Godwin*, 114 Miss. 324, 75 So. 122 (1917).

²⁴ *In re Smith's Will*, 170 Misc. 556, 11 N. Y. S. (2d) 945 (1939).

No authority need be cited for the proposition that the remainderman, being the one vitally concerned, would have the right to seek such security. There is the possibility, however, that the executor or the court administering the estate, even in the absence of a request by the remainderman, may have the right or even the duty to exact security from the life tenant before distribution is made to him. The executor has been held to have a duty to require security before delivering property to a life tenant who is a non-resident²⁵ or where the testator has not manifested an intention that the property should be delivered to the life tenant,²⁶ but other cases have held that this was merely a discretionary right which the executor might or might not exercise as he saw fit.²⁷ Insofar as a court might be concerned, it was said, in *Phipps v. Doak*,²⁸ that a court would be lacking in authority to order property turned over to a life tenant without requiring security when such life tenant had not been given power to dispose of the principal but it would seem that, in the absence of a statute or a clear expression of a testator's intention requiring such security, the court would only act if requested to do so, and then only in accordance with a proper exercise of judicial discretion.²⁹

Where security has been required and the life tenant has failed or refused to furnish the same, it would be proper for the court to appoint a trustee to manage the property, paying the income therefrom to the life tenant,³⁰ unless the remainderman has waived the giving of security.³¹ In the event security has been denied, it has been customary to require the life tenant to furnish an inventory of the property received³² so as to enable the remainderman to identify the property and to enforce a due delivery thereof when the time for delivery arrives.

²⁵ *Clark v. Terry*, 34 Conn. 176 (1867).

²⁶ *In re Von Kleist's Will*, 256 N. Y. 422, 193 N. E. 256 (1934).

²⁷ *In re Executors of Ira Ryerson*, 26 N. J. Eq. 43 (1875); *In re Hamlin*, 141 App. Div. 318, 126 N. Y. S. 396 (1910); *In re Lowery's Estate*, 19 Misc. 83, 43 N. Y. S. 972 (1896). See also 33 Am. Jur., Life Estates, Remainders and Reversions, § 234.1, and 21 Am. Jur., Executors and Administrators, § 436.

²⁸ 235 Mo. App. 659, 145 S. W. (2d) 167 (1940).

²⁹ Statements to that effect can be found in *Colburn v. Burlingame*, 190 Cal. 697, 214 P. 226, 27 A. L. R. 1374 (1923); *Quigley v. Quigley*, 370 Ill. 151, 18 N. E. (2d) 186 (1938); *Burnett v. Lester*, 53 Ill. 325 (1870); *Evans v. Adams*, 180 S. C. 214, 185 S. E. 57 (1936); *In re Robinson's Will*, 101 Vt. 464, 144 A. 457 (1929).

³⁰ *Frye v. Community Chest*, 241 Ala. 591, 4 So. (2d) 140 (1941); *In re Lowery's Estate*, 19 Misc. 83, 43 N. Y. S. 972 (1896); *Ernul v. Ernul*, 191 N. C. 347, 132 S. E. 2 (1926).

³¹ *Owen v. Owen's Executor*, 236 Ky. 118, 32 S. W. (2d) 731 (1930); *Maguire v. Maguire*, 110 La. 279, 34 So. 443 (1903); *In re Gillett's Estate*, 130 Pa. Super. 309, 197 A. 517 (1938).

³² See *Heintz v. Parsons*, 233 Iowa 984, 9 N. W. (2d) 355 (1943); *In re Will of Oertle*, 34 Minn. 173, 24 N. W. 924 (1885); *Covenhoven v. Shuler*, 2 Paige Ch. 122, 21 Am. Dec. 73 (N. Y., 1830); *Westcott v. Cady*, 5 Johns. Ch. 334, 9 Am. Dec. 306 (N. Y., 1821); *Bentley v. Long*, 1 Strob. Eq. 43, 47 Am. Dec. 523 (S. C., 1846). See also 23 R. C. L., Remainders, § 139.

If protection or security is not provided at the time of distribution, there is very little case law dealing with the protection of remainder interests on other occasions or by other means but statements can be found to the effect that resort to a court of equity would be proper in the event it could be shown that the interests of the remainderman are being jeopardized.³³ In some instances, upon the filing of a bill *quia timet*, relief has been granted, usually in the form of security, upon a proper showing of danger to the future interest.³⁴ Doctrines relating to constructive trusts have also been utilized in instances where the personal property has been turned over to a life tenant without requiring security³⁵ or where a non-resident life tenant, given the power of disposal, has been making fraudulent transfers to third persons.³⁶ It is unlikely, therefore, that in a proper case the remainderman would be without some form of prospective, if not present, remedy for the protection of his interests.

Few jurisdictions have enacted statutes which throw light on the problem. Some of these statutes require that an inventory be given by the life tenant.³⁷ Others provide for a writ of *ne exeat* in case the life tenant seeks to remove the property from the jurisdiction without the consent of the remainderman.³⁸ Connecticut provides for either a bond or the appointment of a trustee whenever a life estate has been created in personalty and no trustee has been named to hold the property during the life term.³⁹ Delaware requires a penal bond double the value of the estate where the executor or administrator *cum testamento annexo* is also the life tenant,⁴⁰ provides for the removal of the executor or administrator for failure to furnish the penal bond, to be followed by the appointment of a trustee,⁴¹ and gives the executor, in other situations, the right to petition the court for the appointment of a trustee where the life tenant is entitled to no more than the income from personal property.⁴² The Kansas statute provides that the probate court may order delivery to

³³ *Terry v. Allen*, 60 Conn. 530, 23 A. 150 (1891); *Foley v. Syer*, 121 Md. 79, 88 A. 38 (1913).

³⁴ *Story*, op. cit., Vol. 2, § 845. This practice has been upheld in *Peters v. Rhodes*, 157 Ala. 25, 47 So. 183 (1908); *Lewis v. Hudson*, 6 Ala. 463 (1844); *Rowe's Executors v. White*, 16 N. J. Eq. 411, 84 Am. Dec. 169 (1863).

³⁵ *In re Read's Estate*, 141 Misc. 716, 253 N. Y. S. 648 (1931).

³⁶ *Abbott v. Wagner*, 108 Neb. 359, 188 N. W. 113 (1922). The court there held that the life tenant was not a necessary party to a suit between the remainderman and the third person.

³⁷ Cal. Probate Code 1931, § 1065; Mont. Rev. Code 1947, § 91-309; Nev. Comp. Laws 1929 (1931-41 Supp.), § 9882.273; Utah Code Ann. 1953, § 74-3-11.

³⁸ Ala. Code 1940, Tit. 47, § 64; Ga. Code Ann. 1951, § 85-1708.

³⁹ Conn. Gen. Stat., 1949 revision, § 6971.

⁴⁰ 12 Dela. Code 1953, § 1528.

⁴¹ *Ibid.*, § 1530.

⁴² *Ibid.*, § 1551.

either the life tenant, the executor, or to a trustee where the use or income of property is given, which court may require the giving of a bond.⁴³ Louisiana seemingly attempts to cover the whole problem by means of its statutory provisions concerning usufructs.⁴⁴ Michigan, on the other hand, makes it mandatory for the probate court to either appoint a trustee or to require a bond from a life tenant who has not been given an unlimited power to take or exhaust the principal.⁴⁵ New York gives to the surrogate the power to demand security from the life tenant when the possession or control of either real or personal property has been given by a will, in the absence of an express declaration to the contrary,⁴⁶ and declares that every right granted against a testamentary trustee shall apply to a similar proceeding against a legal life tenant.⁴⁷ Pennsylvania permits the sequestration of the life estate⁴⁸ while Vermont invests the probate court with no more than a discretionary power to appoint a trustee where the use of property is given for life or for a term of years.⁴⁹

It would seem, then, from what has been said, that a remainderman is not forced to rely for protection solely upon the good faith of the life tenant for, while there are apparent weaknesses in individual jurisdictions, the remedies available appear to be reasonably adequate. Bearing in mind, however, that a large percentage of remaindermen are either children of tender years or may be persons as yet unborn, hence in no position to take affirmative action for the protection of their rights, it could be suggested, by way of constructive criticism, that their interests would be better protected if personal representatives or courts were obligated to be more circumspect whenever such interests appear to be involved. If such were the case, a reading of the entire recipe would not then be likely to cause any degree of indigestion.

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⁴³ Kan. Gen. Stat. Ann. 1949, § 59-1506.

⁴⁴ La. Stat. Ann., Civ. Code 1950, Art. 557 et seq.

⁴⁵ Mich. Stat. Ann., 1943 revision, Vol. 23, § 27.3178(165).

⁴⁶ Thompson Consol. Laws N. Y., Surrogate Court Act, § 169a.

⁴⁷ Ibid., § 261a. For a criticism of these provisions, see Glendening, "Legal Life Tenant Subject to Jurisdiction of Surrogate," 26 *Corn. L. Q.* 457 (1940-1).

⁴⁸ Purdon Pa. Stat. 1953, Vol. 68, §§ 231-3.

⁴⁹ Vt. Stat., 1947 revision, § 3123.